

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2004 Session

FRANCES MOXLEY ZINDER v. MARK DOUGLAS ZINDER

**Appeal from the Circuit Court for Davidson County
No. 97D-971 Marietta M. Shipley, Judge**

No. M2003-02507-COA-R3-CV - Filed February 23, 2005

The trial court assessed \$7,000 of Mother's attorney fees against Father. Father appeals contending that he was the prevailing party; therefore, the court should have assessed his fees against Mother pursuant to the marital dissolution agreement and Tenn. Code Ann. § 36-5-103(c). Finding Father's argument partly correct, we vacate the award of attorney fees against Father but find that each party should be responsible for its attorney fees.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., and WILLIAM B. CAIN, J., joined.

Helen Sfikas Rogers and Robin K. Barry, Nashville, Tennessee, for the appellant, Mark Douglas Zinder.

Dot Dobbins, Nashville, Tennessee, for the appellee, Frances Moxley Zinder.

OPINION

This is a dispute between ex-spouses over the payment of attorney fees. Frances and Mark Zinder (Mother and Father, respectively) married in 1981 and divorced in 1999. Their final divorce decree incorporated a marital dissolution agreement (MDA) which in turn, incorporated a permanent parenting plan outlining the residential schedule of the parties' three minor children and allocating parenting responsibilities.

Father filed this petition¹ in February 2003 seeking, *inter alia*, (1) to modify the visitation schedule, (2) to award a judgment for medical expenses Mother allegedly owed, and (3) to hold Mother in contempt for failing to reimburse Father for half of the children's uncovered medical

¹Father's original petition was actually filed November 12, 2002. His first amended petition was filed January 10, 2003. The petition mentioned from February 2003, from which this appeal arises, was actually Father's Second Amended Petition for Civil and/or Criminal Contempt, to Modify Residential Time and for a Decrease in Child Support.

expenses and for failing to provide annual tax returns, W-2s and 1099s, as required by the permanent parenting plan. Mother answered and filed a counter-claim seeking to have Father held in contempt for violating the permanent parenting plan, including allegations that Father ignored the requirement that decisions regarding the children's religious upbringing and non-emergency health care be made jointly, and that Father repeatedly spoke derogatorily of Mother to the children. Mother also made allegations against Father concerning the children's discipline, their television viewing and Internet use, and the children's safety, particularly motorcycle safety or the lack thereof. In addition thereto, Mother asked that she be designated as the party responsible for all major decisions regarding the children and that the children's residential schedule be modified so to reduce Father's visitation schedule to one night a week and every other weekend. As for attorney fees, each party requested that a judgment for attorney fees and costs be assessed against the other.

Following a hearing, the trial court modified the children's residential schedule, as requested by Father. Thus, instead of spending two to four days a week with Father, as set forth in the initial parenting plan, the children would be spending alternating weeks, seven consecutive days every other week, with each parent. The trial court determined that the disputed medical bills, some paid by Father and some by Mother, totaled \$4,264.69. Of that amount \$2,477.46 resulted from the son's motorcycle accident. Pursuant to the MDA, each party was responsible for fifty percent of the expenses that had not been reimbursed. Without explaining its reasoning, the trial court determined that Father was responsible for seventy-five percent of the medical bills related to the son's motorcycle accident and that Mother was responsible for only twenty-five percent of the medical expenses arising from the accident.² Following a somewhat complex allocation of credits and debits for medical expenses each parent had incurred and paid, and the amount each parent owed the other parent, a judgment was entered stating that Mother owed Father a net of \$970.76, representing her half of the children's uncovered medical expenses.³ The trial court then determined that Father was responsible for a portion, but not all, of Mother's attorney's fees and assessed \$7,000 of her fees against him. Both parties filed motions seeking to alter or amend the trial court's ruling, which were for the most part denied.⁴ Father appealed. The sole issue on appeal is whether the trial court erred by ordering Father to pay \$7,000 of Mother's attorney fees.

²The trial court did not expressly state that Father's negligent supervision of the son's use of a motorcycle was the basis for the disparity of the allocation of this medical expense. There is no evidence in the record to justify such allocation other than finding him responsible, at least in part, for the motorcycle injuries sustained by the son.

³Each parent had incurred and paid medical expenses for which each parent was entitled to reimbursement of half from the other, with the exception of the 75%-25% allocation of the expenses resulting from the motorcycle wreck. The court found that the medical bills "that would be divided equally between the parties" pursuant to the MDA was \$1,787. Thus, each was responsible for \$893. Further, the court found Father responsible for \$2,751 and Mother responsible for \$1,512 and that Mother had paid \$572 towards the total. After the math was done, Mother was ordered to pay Father \$970. Neither party appeals the allocation or calculation of the medical expenses.

⁴The only change made in response to the motions to alter or amend is that the weekly exchange of the children was changed to 10:00 a.m. during the summer, and after school during the school year.

Father contends that the trial court had no legal or factual basis upon which to assess any of Mother's attorney fees against him. Moreover, he argues that he, not she, was entitled to recover attorney fees. He relies on Tenn. Code Ann. § 36-5-103(c) and the attorney fee provision in the MDA. Tenn. Code Ann. § 36-5-103(c) provides that the prevailing party may recover attorney fees incurred in enforcing a decree for child support or custody. Paragraph eleven of the MDA provides that if either party institutes legal proceedings to enforce any provision of the MDA, the prevailing party shall be entitled to a judgment for attorney fees. Father asserts that he is the "prevailing party" because his residential time with the children was modified as he requested and he recovered from Mother a deficiency judgment for the children's uncovered medical expenses. For her part, Mother argues that she too was a prevailing party. She argues that she was successful in seeking various modifications of the parenting plan which were due in part to Father's failures as indicated by the trial court's references to consistent discipline problems, the failure to monitor television and internet use, the hazards of a child riding a motorcycle, allocation of medical decisions, and admonitions of Father expressing animosity toward her in the children's presence.⁵ She also relies on the fact that her reluctance to pay medical expenses was justified by the court's decision to award substantially less medical expense reimbursement than Father sought.

The award of attorney fees in child support and custody cases is within the discretion of the trial court. Tenn. Code Ann. § 36-5-103(c); *Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn. Ct. App. 1993). Attorney fee awards are reviewed under an abuse of discretion standard. *Garfinkle v. Garfinkle*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996); *Killingsworth v. Ted Russell Ford*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002).

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Tenn. Code Ann. § 36-5-103(c) provides for an award of attorney fees to a prevailing party in a child support or custody matter. It states,

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which

⁵ Mother was admonished as well.

fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c).

Paragraph eleven of the MDA provides, “In the event that it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provision of this agreement, the prevailing party shall be entitled to a judgment for reasonable expenses, including attorney’s fees, incurred in prosecuting the action.”

The trial court awarded attorney fees based on Father’s “greater assets” and his alleged threats to Mother of decreased residential time with her children. The trial court explained:⁶

Frankly, it is not unusual that the court does not see any one of the parents as being the “prevailing party.” . . . The underlying issue in the original petition was that Mr. Zinder wanted to have more time with the children. He was not really stating that Ms. Zinder was a bad parent, or that the children only wanted to live with him, he just wanted more time, as his travel schedule had changed. He sought medical expenses from Ms. Zinder. The records were so confusing for both parties, that the court took it under advisement and ordered Ms. Boswell,⁷ as special master, to make the determination. After the dust settled, Ms. Zinder owed \$970.00. . . .

The court finds that as Mr. Zinder has the greater assets and primarily threatened Ms. Zinder with losing time with her children, that he should be responsible for a portion of Ms. Dobbins’ [Mother’s attorney] fees. The court awarded only a portion of the original fee in the amount of \$7000.00. That means that Ms. Zinder would have to bear that expense of figuring out the medical expenses in the amount of \$8000, plus the new time.

At first blush it would appear that Father is the prevailing party. A closer examination of the record reveals that such is not the case. Contrary to his contentions, the residential schedule proposed by Father and implemented by the court did not result in an increase in Father’s residential time. Indeed, Father was successful in implementing a revised residential schedule, on a week to week rotation. The former residential schedule allowed Father, “between 2–4 days of visitation each week with the parties’ minor children.” Thus, Mother did not lose time with the children. Moreover, the revised schedule was not due to a breach by Mother of the MDA, at least no more of

⁶This explanation was provided in the trial court’s memorandum opinion arising from the May 6, 2003 hearing on Father’s motion to alter or amend.

⁷Ms. Boswell was the trial judge’s law clerk.

a breach than that by Father.⁸ The result was merely a different schedule. Father was successful in recovering unpaid medical expenses from Mother; however, only to a degree, because Mother was able to justify her temporary refusal to remit her share of medical expenses. This was due in part to Father's inadequate and questionable records and his failure to properly supervise and protect the child from hazards associated with riding a motorcycle. Furthermore, Mother prevailed by obtaining numerous modifications to the parenting plan.

A party's ability or inability to pay attorney fees should not dictate a court's decision. *See Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992). Guidance for awarding attorney fees is provided in Tenn. Code Ann. § 36-5-103(c) and the parties' MDA. Moreover, neither the statute nor the MDA provide that one party or the other will always be awarded fees. Each provides guidance for the determination of whether to award and, if so, how to award attorney fees. Moreover, the statute is merely permissive. It provides that a party "may" recover in certain circumstances. The MDA appears to be mandatory. This is because it uses the term "shall," but there is a condition precedent. There must be a prevailing party. We have concluded that both parties prevailed to a degree, thus neither party "prevailed" in an effort to enforce a provision of the MDA. Therefore, we find that the condition precedent in the MDA was not satisfied. Since neither party prevailed, neither party is entitled to recover attorney fees pursuant to the MDA.

Accordingly, we find that neither party is entitled to recover attorney fees and related expenses from the other under the statute or the MDA. Therefore, the award of Mother's attorney fees and expenses against Father is vacated. Each party shall be responsible for its attorney fees on appeal. This matter is remanded to the trial court with costs of appeal assessed equally against the parties.

FRANK G. CLEMENT, JR., JUDGE

⁸The record reveals that the most serious breach is the acrimony of the parents and the adverse effect of such on the children.